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SUBJECT: TIFA MEETINGS FOCUS ON TRADING RIGHTS, IPR AND MARKET ACCESS

REF: HANOI 345

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11. (SBU) Summary: The United States and Vietnam conducted Trade and Investment Framework Agreement (TIFA) talks in Hanoi from March 19 - 21, during which the sides followed up on a full range of WTO implementation and other issues including IPR, market access for pharmaceuticals and cultural products and excise taxes on alcoholic beverages. USTR Southeast Asia Director David Bisbee, who led the U.S. delegation, pressed the Vietnamese to continue to implement its WTO accession commitments and make progress on outstanding issues to accelerate the development of our bilateral trade and investment relationship. IPR issues - both long-standing ones like issuance of a criminal circular and emerging issues like internet piracy and ineffective implementation of data protection regulations - loomed large as the biggest hurdles in the trade relationship. Bisbee pushed hard for increased market access for U.S. IP-based industries as a way to create a legitimate alternative to pirated products and allow U.S. right holders to play an active role in supporting better IP protection here. The discussions under TIFA underscored the potential impact that Vietnam's weak IPR enforcement and protection regime could have on its goals to promote greater foreign investment and to be eligible for the U.S. GSP program. This second round of TIFA talks was productive and largely positive, although there are growing concerns and frustrations on the IP front. End summary.

12. (U) From March 19-21, Office of the U.S. Trade Representative (USTR) Director for Southeast Asia David Bisbee met with officials from more than 15 Government of Vietnam (GVN) ministries to follow up on discussions begun during the first TIFA meeting in December 2007 and to raise new issues under the umbrella of the TIFA. U.S. Patent and Trademark Office (USPTO) Regional IP Attache Jennie Ness also participated, along with officers from Embassy Hanoi's Economic and Foreign Commercial sections.

PRIVATE SECTOR MEETING

13. (U) Before the TIFA kicked off, the U.S. delegation met on March 19 with the U.S. business community in Vietnam at a roundtable

organized by the US-ASEAN Business Council. The meeting was attended by representatives from GE and GE Money, Chevron, AES, Microsoft, GlaxoSmithKline, Emerson Electric, Ford, Motorola, UPS, Citibank, Pfizer, Merck, the Duane Morris, Baker McKenzie and Tilleke & Gibbins firms, and AmCham Hanoi.

14. (SBU) The private sector representatives described engagement with the GVN as largely positive, especially at the higher levels. They noted, however, a lack of follow-up among working-level and implementing officials. Many, including Ford and GE Money, cited cases where they are afforded insufficient time to comment on regulations affecting their sectors, and instances where they were not shown drafts at all prior to issuance. Bisbee agreed that in many instances the GVN seems to lack the "right set of tools" to deal with implementation, and encouraged the private sector to keep USTR and the Embassy aware of their specific concerns, to be able to point to specific areas for improvement in discussions with the GVN.

The pharmaceutical industry noted their particular interest in working with USTR to ensure Vietnam has in place regulations to meet its WTO commitments and that the industry is ultimately able to establish a commercial presence in Vietnam and engage in a full range of business activities. A key goal shared by all present at the briefing was a desire for all regulations to be sufficiently clear for local and provincial level officials to implement fully.

15. (SBU) The USG and private sector participants discussed areas in which they could cooperate to improve capacity building, including in the judicial system. "People would be happy to settle disputes in Vietnam if the court system was adequate," the managing partner of Baker McKenzie commented. Bisbee noted Embassy Hanoi's education initiative as another promising area of private sector-USG-GVN partnership.

TRADE AND DISTRIBUTION RIGHTS

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16. (SBU) The TIFA talks coincided with an announcement from the Ministry of Industry and Trade (MOIT) that it was considering a repeal of the much-criticized one-distributor restriction, and allowing foreign firms - that are registered to do business in Vietnam but not licensed to conduct distribution activities - to, in effect, wholesale imported goods to multiple distributors -- albeit with some restrictions intended to prevent those foreign firms from operating a full-scale distribution network. USTR and Mission Vietnam have worked for months to persuade Vietnam to apply less restrictive measures on the distribution services sector, which is set to open to most foreign-owned firms in January 2009.

17. (SBU) At the TIFA meeting on March 19, Bisbee and Econoff suggested to the MOIT that it would be simpler and easier to open the distribution sector (which includes retail sales) now and simply be done with all restrictions, rather than work to redraft regulations that would be obsolete in nine months. Hoang Thi Hoa, Deputy Director of the MOIT Planning and Investment Department (and in charge of implementing the distribution rights schedule), said that she agreed but that with all the work done on redrafting the regulations (known as "Circular 9"), the GVN would probably go ahead and issue them. Ms. Hoa said that her team is still working on the new Circular 9, and hoped to issue it sometime in April. The two sides agreed to continue to coordinate closely on this issue under the TIFA to ensure that any future revisions to the implementing guidelines would be consistent with Vietnam's WTO obligations.

18. (U) Bisbee also advised Ms. Hoa to do away with the "Economics Needs Test" (ENT), a provision that Vietnam had negotiated as part of its WTO service sector commitments, which now looks like "nobody's child." The GVN has shown a murky understanding of what the ENT aims to do. Ms. Hoa agreed that it was unclear and maybe not needed at all, and asked for assistance in finding alternate ways of regulating business zones. (Note: During the last TIFA, in December 2007 in Washington, Ms. Hoa led a trade and distribution delegation to the United States sponsored by USAID. During that trip, USTR had her and the delegation meet with Alexandria, VA, planning and zoning authorities when it became apparent that what

the GVN understood by ENT was more akin to U.S. land use and zoning regulations.)

VIETNAM'S GSP SUBMISSION

¶9. (SBU) The GVN acknowledged that it had work to do to improve labor standards and intellectual property rights (IPR) in the country; issues particularly relevant as the government consider seeking eligibility for the U.S. GSP program. The two top officials of the MOIT's Americas Department said that they submitted a report to the Prime Minister the second week of March outlining the advantages and risks of submitting a GSP application. A high-level official from the Labor Ministry (MOLISA) reported at the TIFA meeting that the GVN has asked the ILO for assistance in revising its Labor Code, including provisions relating to freedom of association and collective bargaining rights. MOLISA also informed the delegation that the ministry was preparing written comments to provide updates to an existing CRS report on Vietnam's labor regime.

¶10. (SBU) The MOIT report recommended that the Prime Minister or some other high-level GVN official submit the GSP application, presumably during a visit to the United States. The MOIT officials said that it could well be during MOIT Minister Hoang's intended U.S. visit in late May or early June. Concurrently, Vietnam is planning to apply for GSP with the EU, according to our EU counterparts.

IPR CONCERNS LOOM LARGE

¶11. (SBU) The U.S. delegation noted ongoing concerns over Vietnam's IPR protection and enforcement to a roundtable of IP agencies led by the National Office of Intellectual Property (NOIP). Most prominently, the U.S. officials reiterated longstanding and serious concerns with Vietnam's outstanding commitment to draft a regulation ("Criminal Circular") to provide criminal remedies for commercial scale trademark and copyright violations. Vietnam committed to issue this Criminal Circular upon accession to the WTO in January 2007, and is now more than 14 months overdue. USTR Director Bisbee

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noted that the U.S. has worked closely with the drafters and has provided comments and suggestions on this Circular for over two years, yet the latest draft raises serious WTO TRIPS concerns. Bisbee urged the GVN to delay issuance of the draft if U.S. comments had not been incorporated. (Note: Post later learned that the draft circular was issued on March 18, and will take effect April 2.)

¶12. (SBU) The language of the latest Criminal Circular appears to fall far short of what is needed to meet Vietnam's TRIPS obligations and to provide an effective deterrent to piracy, Bisbee continued, underscoring why the United States wants to engage with the legislative drafting committee for upcoming revisions to Vietnam's criminal code as soon as possible. While the two sides have a tremendously strong relationship, Vietnam's failure to meet this important WTO accession commitment is overshadowing progress in other areas, and has the potential to stop other initiatives from moving forward until the deficiencies are fixed, he stated.

¶13. (SBU) The U.S. delegation observed that Vietnam's reliance on an administrative system to deal with IP violations, which appears to be modeled after China's system, is not effective and is not deterring pirates and counterfeiters. The fines are too low, right holders are required to send warning letters to infringers before any administrative action can be taken and administrative officials do not know how to determine what is infringing or counterfeit (NOIP no longer will perform this role). In civil cases, the burden on IP right holders to prove actual damages serves as a bar to taking action. They explained that the United States wants to work with Vietnam to address these concerns, particularly as China's system has already proven to be ineffective and controversial; highlighting that ASEAN countries themselves point to China as the biggest source of the region's IP woes. NOIP General Director Tran Manh Hung acknowledged some of these faults but countered that the

administrative system, while not perfect, provides a "rapid and effective" way to address IP violations. He welcomed continued engagement from the United States to improve IPR enforcement.

¶14. (U) Citing cooperation between the two governments last year to end the pirating of cable broadcast content by VTC, the state-owned cable company, the U.S. delegation asked the GVN's assistance in addressing a new issue - internet based piracy. Two websites owned by state-owned telecom giant VNPT, socbay.com and zing.vn, offer links to download free music without the artists' authorization. Although pirated foreign music is available at these sites, the U.S. side pointed out that the biggest victims are Vietnamese artists. NOIP's Hung and representatives from the Ministry of Information and Communications and the Ministry of Culture, Sport and Tourism (MOCST) agreed to look into this issue. USPTO's Ness encouraged Vietnam to consider joining the WIPO Internet Treaties, which she said could help Vietnam to stamp out this type of problem.

PHARMACEUTICAL IP ISSUES AND MARKET ACCESS

¶15. (SBU) Officials from the Ministry of Health's (MOH) Drug Administration told the U.S. delegation that pharmaceutical companies (including Swiss firms Novartis and Astra-Zenica) have filed five applications thus far under Vietnam's regulations for protection of data submitted in drug registration dossiers. All five applications have been denied based on MOH officials' assessments that the products have been on the market "for years" in other countries and that the data is therefore publicly available and undeserving of protection in Vietnam. MOH officials then described their process for assessing whether each dossier merits protection, including research to see whether the information in the dossier is a trade secret. (Note: Pharmaceutical companies had separately told the delegation that MOH also required them to submit evidence of the costs of their clinical trials so as to prove that the data was the product of "remarkable investments." End note.) The U.S. delegation expressed concerns that the evaluation process the officials described is not consistent with the system Vietnam explained it would use to meet its WTO and BTA commitments during previous discussions. MOH agreed that it would send the U.S. side an official response describing the reasons for refusal in these five cases and listing the conditions that companies must meet to merit data exclusivity.

¶16. (U) Bisbee also asked the Drug Administration officials for clarification on a recent GVN circular seeking to regulate drug

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prices in Vietnam by referencing prices for those drugs in other countries in the region. Specifically, he raised concerns that this policy appears to only focus on the drug prices of foreign firms but not those of domestic drug producers. The Vice Director of the Drug Administration Nguyen Van Thanh responded that the circular was passed to avoid "sudden surges" of drug prices in Vietnam and to protect Vietnamese consumers and patients from paying "unreasonably high" prices. Initially insisting that the policy does not discriminate against foreign firms, Thanh ultimately admitted that it puts in place different systems to evaluate the prices used by foreign firms and by those who do not export. He agreed to report this issue to his ministry's leadership, and will respond to the USG in writing. Thanh also committed to answer U.S. questions about which activities foreign drug companies are permitted to conduct in Vietnam, and to address requests about how Vietnam's clinical trial requirements (i.e., drug companies can not rely on clinical trials performed in any other country to seek registration in Vietnam) relate to plans for further ASEAN integration on drug registration.

FOREIGN INVESTMENT IN SOME CULTURAL AREAS STILL TABOO

¶17. (SBU) The Ministry of Culture, Sports and Tourism confirmed that foreign companies have limited access to Vietnam's film market, and can work with local partners on certain book publications, but the sound recording and performance arts sectors remain closed. Pointing to a 1999 regulation, MOCST officials said that foreign investors are prohibited from the music, performance art, video and

CD industries. Although the ministry plans to update the regulation in the near future, there are currently no plans to expand market access for foreign firms. Paradoxically, one MOCST official said that Vietnam first wants to rein in the rampant piracy of cultural products before it permits foreign investment. To this end, MOCST has asked the Copyright Office of Vietnam to draft a decree on optical media regulation. The MOCST officials emphasized that they take fighting IPR violations seriously, but could not initiate an immediate, wide-scale crackdown on stores selling pirated goods for fear it "may violate the human rights of those vendors." USTR's Bisbee responded that permitting foreign investment and providing a legitimate market would allow foreign firms to become involved in efforts to combat piracy, and urged the GVN to consider permitting foreign participation in these "culturally sensitive" areas in the near future. The MOCST officials agreed to continue dialogue on this issue with the U.S. side, and will provide further written clarification on permissible activities for foreign firms offering cultural products.

RESPONSE ON BIT IS COMING SOON

¶18. (SBU) An official from the Ministry of Planning and Investment's (MPI) Legal Department, the lead agency in ongoing BIT exploratory talks, told the U.S. delegation that the GVN faces "many challenges" before it can enter into a Bilateral Investment Treaty (BIT) with the United States. The official pointed out that Vietnam is considering how this new agreement would affect the "the BTA and WTO commitments it has already undertaken," while also studying how a BIT would impact Vietnam's commitments under other frameworks such as ASEAN. He underscored that Vietnam is also busy negotiating agreements with Japan, the EU, New Zealand, ASEAN, and most recently, Canada and Croatia, which is straining Hanoi's limited resources. These "challenges" notwithstanding, Vietnam wants to continue BIT discussions and hopes to send its comments to the United States "very soon," the MPI official continued. (Note: In a separate March 21 meeting, MPI Minister Vo Hong Phuc told visiting Deputy National Security Advisor Dan Price that Vietnam wants to pursue BIT talks -- REFTEL.)

EXCISE TAX ON ALCOHOL

¶19. (SBU) Ministry of Finance officials told USTR's Bisbee that a recently-formed drafting committee will soon begin work on an Excise Tax Law to fulfill Vietnam's commitment to transition to a WTO consistent excise tax regime by 2010. Bisbee stressed the importance of Vietnam finishing this law in time. The MOF officials insisted they will complete the regulation by 2010, even allowing for the necessary National Assembly review and passage. The Ministry plans to have a draft ready by June and wants to submit it

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to the National Assembly for review during its November 2008 session. At Bisbee's request, the MOF officials confirmed that Vietnam would share the draft with the United States and will make it available for public comment on its website.

¶20. (U) On a related issue, the MOF officials confirmed that Vietnam's import duty tariffs on alcohol will fall from the WTO initial rates to the final bound rates in equal linear stages, if not faster - pointing out that the 2008 rates were actually lower than required to meet Vietnam's commitments. This confirmation was in response to questions raised by the delegation on behalf of the U.S. beer industry which had been incorrectly informed that Vietnam had not lowered its duty on beer as of January 1, 2008.

OTHER ISSUES

¶21. (SBU) The United States consulted with the Vietnamese on their willingness to become an observer to the Government Procurement Agreement in the WTO and to consider joining the Multi-chip Agreement, an initiative discussed under the U.S.-ASEAN TIFA. The MOIT expressed interest in both but was noncommittal. The U.S. delegation also asked for more dialogue on Vietnam's draft Law on

Laws, which sets forth the GVN's procedures for issuing new laws, including consultation timeframes. "We want to ensure that the private sectors from both our countries have the opportunity to comment and engage Vietnam on important legislation," USTR's Bisbee noted. An official from the Office of the Government commented that a mission from Vietnam's National Assembly would soon travel to Washington to learn more about U.S. lawmaking procedures.

¶22. (SBU) The GVN also raised concerns over the Department of Commerce monitoring program for garment exports, particularly as the time approaches for the Import Monitoring Program's (IMP) next report in a few weeks' time. The Director of the International Department of the Office of the Government, Bui Huy Hung said that he hoped that Commerce officials "do the same thing that they did the last time," when they came to Vietnam to explain how the IMP works in the weeks preceding the first report, released on October 26, 2007. In fact, a Commerce technical group will be in Hanoi in late March - early April to discuss garment exports and the IMP with the GVN and other interlocutors.

COMMENT

¶23. (SBU) The second round of TIFA talks moved forward a number of issues of bilateral importance and broadened our dialogue on trade and investment matters. Vietnamese press reported positively on the talks; a sentiment which was underscored by press coverage of visiting Deputy National Security Advisor Dan Price's meetings. GVN interlocutors throughout the meetings expressed an interest and willingness to continue to engage on key issues, including those on which the two sides do not fully agree. IPR concerns, however, are becoming more prominent and threaten to stall progress in other areas, including Vietnam's aspirations for eligibility in the GSP program and desire to have the United States remove it from the Special 301 Watch List. Despite U.S. technical assistance and extensive engagement on IP issues, Vietnam has put in place a legal framework and mechanisms which, in practice, have not yet resulted in deterrent penalties and appear to shield violators from effective prosecution. Vietnam's rush to move forward with a highly problematic Criminal Circular that does not appear to take U.S. concerns into account is particularly troubling. The TIFA remains an important tool to address this, and other outstanding issues. End comment.

¶24. (U) This telegram was cleared by USTR's David Bisbee and USPTO's Jennie Ness.

MICHALAK